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85-5487

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ORIGINAL

MICHAEL MARNELL SMITH,

Petitioner,

v.

RAYMOND K. PROCUNIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Where Dr. Pile had been appointed by the Court to conduct an independent psychiatric evaluation of Petitioner to help defense counsel decide whether to offer a psychiatric defense or psychiatrically-based claim in mitigation, but defense counsel had decided not to call Dr. Pile as a witness or to offer any other testimony putting Petitioner's mental condition in issue, was Petitioner's Fifth Amendment privilege against self-incrimination violated when the prosecution called Dr. Pile to testify at the sentencing hearing about incriminating statements made by Petitioner during the evaluation?

2. In a capital murder case in which the jury imposed the death sentence finding two aggravating circumstances, one of which was based on the constitutionally inadmissible testimony of Dr. Pile, does this Court's decision in Zant v. Stephens require appellate courts to ignore the constitutional error and affirm the death sentence?

3. Where Petitioner's trial counsel failed to obtain an adequate mental evaluation, to protect Petitioner's Fifth Amendment rights in connection with a pretrial mental evaluation, or to prepare for and conduct an adequate examination of psychiatric experts at trial, was Petitioner denied effective assistance of counsel at and in connection with the capital sentencing phase of his trial?

4. Where the instructions given to Petitioner's jury at the sentencing phase of his capital trial did not make clear to the jury its prerogative to impose a life sentence even if it found one or more aggravating circumstances, and in fact clearly implied that the jury was obliged to impose a death sentence if it found one or more aggravating circumstances and no superseding mitigating circumstances, was Petitioner denied his right to an individualized determination that death was the appropriate punishment in his case?

Limited to
Question
1 & 2

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## ASSIGNMENTS OF ERROR

1. The Fourth Circuit erred in holding that it was barred by Zant v. Stephens from reversing Petitioner's death sentence because constitutionally inadmissible evidence was introduced at his sentencing hearing.

2. The Fourth Circuit erred in holding that Petitioner received the effective assistance of counsel at his trial.

3. The Fourth Circuit erred in denying Petitioner's claim that his jury had been improperly instructed at the sentencing phase of the trial.

## JURISDICTION

The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

## STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive standards for imposition of the death sentence is Va. Code Ann. § 19.2-264.2 (Cum. Supp. 1977):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to Va. Code Ann. § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or
>
> (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or
>
> (iii) the victim was a participant in the defendant's conduct or consented to the act, or
>
> (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct

> or to conform his conduct to the requirements of law was significantly impaired; or
>
> (v) the age of the defendant at the time of the commission of the capital offense.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S. CONST. AMEND. VI.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. VIII.

> No State shall...deprive any person of life, liberty, or property, without due process of law...

U.S. CONST. AMEND. XIV.

## STATEMENT OF THE CASE

Michael Marnell Smith was convicted and sentenced to death for the rape and murder of Audrey Weiler on May 23, 1977. He was tried by a jury in a trial beginning on October 31, 1977, and he was found guilty on November 2, 1977. After a sentencing hearing held on November 3, 1977, the jury returned with a recommendation of death. Judge Russell M. Carneal, Judge of the Circuit Court for the City of Williamsburg and the County of James City, imposed the death sentence on November 30, 1977.

The Supreme Court of Virginia affirmed the conviction and sentence in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979).

Smith then filed a state Petition for Writ of Habeas Corpus, and an evidentiary hearing on ineffective assistance of counsel was held on November 8, 1979. Judge Carneal denied the Petition for Writ of Habeas Corpus by order dated April 16, 1980. The Petition for Appeal to the Virginia Supreme Court of Virginia was denied, and his Petition for Writ of Certiorari was also denied. Smith v. Morris, cert. denied, 454 U.S. 1128 (1981).

A Petition for Writ of Habeas Corpus was filed pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia. The case was referred to a magistrate, but no new factual matters were developed. The District Court, following the recommendation of the magistrate, dismissed the Petition on December 4, 1984.

An appeal was then taken to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit affirmed on May 10, 1985.[1] A Petition for Rehearing or Rehearing En Banc was denied on June 26, 1985.

## STATEMENT OF FACTS

According to his confession, Michael Smith met Audrey Weiler on a beach near his home when he stopped to help her remove briars from her feet. He then grasped her arm and walked with her to a wooded area near the water, pulled out a knife and asked her to take off her clothes. She complied, while protesting. Smith, using a condom, had intercourse with Mrs. Weiler and then started choking her with both hands. He dragged her into the water and submerged her head for several seconds. He subsequently stabbed her in the back with the knife. He left the body and returned home. The medical examiner concluded that the immediate cause of death was drowning, though the stab wounds and the strangulation could also have caused death.

Two days after the offense, investigators came to the Gospel Spreading Church Farm, where Smith lived and worked. When he was confronted with the investigators' suspicions, Smith asked for a Bible. His brother brought a Bible, and Smith and the investigators knelt and prayed. Smith then gave his confession.

### Pre-trial Psychiatric Examinations

On May 26, 1977, David F. Pugh was appointed to represent Smith: he immediately asked that Smith be examined to determine whether he was competent to stand trial. The examina-

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1. Although the case has been marked for publication, counsel is unaware of any citation to the reporter system. Smith v. Procunier, ___ F.2d ___ (No. 85-4001) (4th Cir. 1985).

tion was conducted by Dr. Palmaz, who stated that, in his opinion, Smith was competent to stand trial.

Mr. Pugh was particularly interested in exploring possible psychiatric mitigating evidence. On July 1, 1977, at Mr. Pugh's request, the General District Court ordered an evaluation by Dr. James C. Dimitris and the staff of the Forensic Unit at Central State Hospital; Smith was hospitalized there from July 5, 1977 to August 23, 1977. Dr. Dimitris told Smith before the examination began that any statements by him during the examination could be used against him at either the guilt or sentencing phase of his trial. Dr. Dimitris diagnosed Smith as having an "inadequate personality", and concluded that he was legally sane at the time of the offense.

By Order dated September 28, 1977, Smith's counsel was granted permission to have him examined by Dr. Wendell Pile, a Williamsburg psychiatrist. Dr. Pile conducted a one-hour examination of Smith on October 1, during which he encouraged Smith to make full disclosure of the circumstances of the offense with which he was charged, and of any prior offense. He did not advise or warn Smith that copies of his report would be sent to the Commonwealth's Attorney and the Court, or that any of Smith's statements could be used against him at trial. During this interview, Smith told Dr. Pile that, while driving a school bus, he had torn off a girl's clothes before deciding not to rape her.

In his October 1, 1977, letter to the court and counsel, Dr. Pile mentioned Smith's statements concerning the school bus incident, which until that time had been unknown to either defense counsel or the Commonwealth's Attorney. In that letter, Dr. Pile "diagnosed" Smith as a "sexually deviant sociopath."

## The Trial

This was the first capital murder case tried under the new Virginia death penalty statutes, which became effective July 1, 1977. Accordingly, virtually everything relating to the sentencing phase was entirely new to counsel and to the Court.

There was no real effort to contest Smith's guilt, and this appeal does not seek to overturn Smith's conviction.

At the sentencing hearing, the prosecution put on four witnesses. First, Dr. Pile was called to tell the jury what Petitioner had told him about the school bus incident.

> Q. Did he tell you anything about the girl on the school bus?
>
> A. He did.
>
> Q. What did he say about that?

At this point, counsel objected.

> Your Honor, we're going to object to any testimony made by Dr. Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged...as well as the fact that -- I think that the Commonwealth has to lay the foundation as to what the Doctor instructed Mr. Smith with respect to his rights to say anything to him.

App. 51-52. Judge Carneal overruled the objection, for two reasons. First, he noted that Dr. Pile was, in essence, a "defense" psychiatrist.

> You, having done this, and Mr. Smith having talked to him, I don't believe that Dr. Pile has any duty to inform him that anything he may say to him may be used for or against him in a court of law, as a police officer does under the Miranda.

App. 52-53. The court also ruled that such testimony was made admissible by the broad nature of the capital sentencing inquiry. App. 53. Dr. Pile was permitted to answer the question.

> A. He explained that he was driving a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.
>
> Mr. Person: that's all the questions I have.

App. 55-56.

The Commonwealth's Attorney had not attempted to elicit Dr. Pile's "diagnosis", but defense counsel, inexplicably, did.

> Q. Dr. Pile, in your diagnosis, what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopathic personality, sexual deviation, rape.
>
> Q. What is that?
>
> A. A person who -- is also described as an antisocial personality. They're all sort of

> the same type of -- of personality disorder. The basically [sic] people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of -- of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

App. 57-58.

Counsel testified at the state habeas hearing that he regarded Dr. Pile's diagnosis as unfavorable, that he did not think the diagnosis was supportable on the basis of Dr. Pile's examination, that he would not have called Dr. Pile to testify, that he did not have any idea (at the evidentiary hearing) why he asked Dr. Pile about the diagnosis, that he had not researched federal law concerning possible objections to Dr. Pile's testimony, and that he had not read any psychiatric literature or taken any other steps to familiarize himself with the substantive knowledge necessary for effective cross-examination.

The second Commonwealth witness was Dr. James C. Dimitris, forensic psychiatrist at Central State Hospital, who testified that Smith was competent to stand trial and legally sane at the time of the offense. On cross-examination, defense counsel asked Dr. Dimitris for his diagnosis of Smith. During Dr. Dimitris' testimony, two jurors asked him to explain the difference between his diagnosis ("inadequate personality disorder") and Dr. Pile's diagnosis ("sociopathic personality disorder"), referring particularly to the implications for successful treatment.

The prosecution also called Smith's Parole Officer, Frederick Toepke, who testified about Smith's prior rape conviction, and Investigator Fred Dunford, who again read Smith's confession.

The defense recalled Mr. Toepke to testify that Smith had no criminal record other than the 1973 rape charge, and then called twelve character witnesses and Smith's parents, all of whom gave very brief testimony to the effect that Smith had been a regular churchgoer, a member of the choir, a good bus driver, a

conscientious student at Bruton High School, and a good soldier in Vietnam. His parents also testified about life on the family-owned Gospel Spreading Farm.

When counsel and Judge Carneal retired to chambers to prepare the jury instructions for the sentencing phase of the trial, defense counsel repeatedly objected to Commonwealth's Instruction 1 (found at App. 63), because it did not expressly tell the jury that it could recommend a life sentence even if circumstances in aggravation were found (and even if no mitigating circumstances were found), and because the instruction actually implied that the jury was required to impose the death penalty in such a case. The court eventually granted Instruction 1 and refused to grant Smith's proposed Instruction B (found at App. 65), which would have cured this defect.

The Inadequacy of the Psychiatric Examinations

Though the psychiatric examinations were sought by Mr. Pugh to develop proof of the statutory mitigating circumstances, neither he nor his co-counsel ever discussed mitigation with either psychiatrist. Dr. Dimitris and Dr. Pile were requested only to assess Smith's competency to stand trial and sanity at the time of the offense: neither examiner was asked to perform the more subtle evaluation required for a determination of the presence of the mitigating circumstances outlined in the capital sentencing statute. Dr. Dimitris testified that he was not even made aware of the aggravating and mitigating circumstances in the death penalty statute until the day of the sentencing hearing, when the Commonwealth's Attorney explained to Dr. Dimitris the dangerousness criterion. Although Mr. Pugh had met with Dr. Dimitris at Central State Hospital during the summer of 1977 to discuss his evaluation, Mr. Pugh never asked Dr. Dimitris for an opinion on mitigating circumstances, and he did not even tell Dr. Dimitris what the mitigating circumstances were.

Mr. Pugh never contacted Dr. Pile to discuss the purpose of the evaluation. Dr. Pile testified that none of the provisions of the capital sentencing statute were ever brought to his attention. In fact, Dr. Pile did not realize that the

capital sentencing definitions of mitigating mental abnormality were not interchangeable with the standard M'Naghten inquiry for insanity.

At the state habeas hearing, Petitioner called Dr. C. Robert Showalter, M.D., the Clinical Director of the Forensic Psychiatric Clinic at the University of Virginia, to testify about the adequacy of the 1977 psychiatric evaluations. Dr. Showalter, who at the time of the hearing had evaluated five defendants under the capital sentencing statutes, testified, without contradiction, that an examination sufficient to address the statutory mitigating circumstances would have to be broader in scope and more detailed than the examinations usually conducted to determine competency or sanity, and the examinations performed upon Smith would not have been adequate to develop evidence in mitigation, even had defense counsel sought to elicit such testimony.

Both Dr. Showalter and Dr. Dimitris were critical of Dr. Pile's examination and conclusion. Both testified that a one-hour examination of the nature performed by Dr. Pile, eliciting the information that Dr. Pile elicited, could not provide sufficient information to support his diagnosis. Dr. Showalter, drawing on the American Psychiatric Association's Diagnosis and Statistical Manual, testified that a longer, deeper evaluation would be necessary to confirm such a diagnosis. Dr. Showalter also testified that Dr. Pile's generalized speculation in his trial testimony, about the "usual" behavior of sociopaths, lacked any scientific foundation.

Mr. Pugh testified that he had advised Smith not to discuss the offense or any prior offenses "with anyone". Although he did not recall whether he had specifically warned Smith not to discuss the offense with the psychiatric examiners, he testified that he believed that he did not expect him to discuss the offense with the psychiatrists. In fact, Smith discussed the offense with both examiners. Before beginning his examination, Dr. Dimitris gave Smith the equivalent of Miranda warnings; Dr. Pile did not.

How the Issues Were Preserved on Appeal

Defense counsel did not assign as error on direct appeal the admission of Dr. Pile's testimony, though the issue had been preserved at trial. On appeal, the issue was raised and thoroughly discussed in the Amicus Brief of the Post-Conviction Assistance Project of the University of Virginia School of Law.[2] Notwithstanding questions about procedural default, the Fourth Circuit chose to address the merits of the issue, noting the recent decision of Reed v. Ross, ___ U.S. ___, 82 L.Ed.2d 1 (1984), and Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), aff'd en banc, 754 F.2d 520 (1985), cert. granted sub nom. Carrier v. Sielaff, ___ U.S. ___, 105 S.Ct. 3523 (1985).

The instruction issue was fully preserved, both at trial and on appeal.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

I

This Court should grant certiorari and reverse the judgment below because the Fourth Circuit has fundamentally misconstrued Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983).

In Stephens, this Court held that a death sentence need not be struck down when one aggravating circumstance is subsequently held to be invalid, provided that at least one untainted aggravating circumstances remains, and provided that the evidence introduced in support of the invalid circumstance would have been admissible anyway.

In the present case, the Fourth Circuit in effect assumed that evidence introduced in support of the "future dangerousness" criterion was inadmissible, but held that the presence of the finding of the "vileness" aggravating circumstance would support the death sentence. The evidence was clearly inadmissible; see Battie v. Estelle, 655 F.2d 75 (5th Cir. 1981); Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978); Ake v. Oklahoma, ___ U.S. ___, 84 L.Ed.2d 53 (1985). The record

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2. Counsel for Amicus Post-Conviction Assistance Project is one of Smith's present co-counsel.

shows that the prosecution relied heavily on this inadmissible testimony in its closing argument and that the jury's finding of "future dangerousness" played a determinative role in its decision to impose a death sentence.

The Fourth Circuit arrived at its interpretation of Zant v. Stephens by quoting from that opinion out of context, and by then dropping out a key limiting phrase. This Court had held in Zant v. Stephens that:

> [A] death sentence supported by a least one valid aggravating circumstance need not be set aside under the second Stromberg rule simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty.

Zant v. Stephens, 77 L.Ed.2d at 254 (emphasis added). However, the Fourth Circuit left out the underlined portion of the above quote when it cited it as being the holding of this Court. Of course, by omitting the limiting language, the Fourth Circuit converted a very narrow principle into a sweeping rule of law that far exceeds the ruling of this Court. In doing so, the Fourth Circuit overlooked this Court's repeated comments that Zant v. Stephens was limited to cases in which the evidence was in fact properly admissible. 77 L.Ed.2d at 256 & n.24.

This interpretation of Zant v. Stephens is wrong, it is unprecedented -- Petitioner has been unable to find any other federal decision predicated upon a similar interpretation -- and it is dangerous.

First, it encourages appellate courts to be lazy -- to overlook constitutional violations (perhaps even egregious constitutional violations) in capital cases. See Tuggle v. Commonwealth, ___ Va. ___, ___ S.E.2d ___ (September 6, 1985) (on remand from United States Supreme Court) (opinion has been reproduced in the Appendix at 78-92); Ross v. State, 254 Ga. 22, 226 S.E.2d 194, 203-205 (1985) (citing James Briley v. Bass), 750 F.2d 1238 (4th Cir. 1985). Second, in any state with a "vileness" criterion (or a similar aggravating circumstance), the prosecution would be free, as a matter of federal constitutional law, to violate with impunity virtually every constitutional

protection to which a capital defendant may be entitled at sentencing -- as long as the crime involved more than a single gunshot. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980).

It is important that this court grant certiorari and reverse the Fourth Circuit, on this ground alone, for three reasons:

1. The Fourth Circuit's opinion is wrong:

2. The Fourth Circuit's opinion is in conflict with rulings of the Fifth and Eleventh Circuits in Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), Morgan v. Zant, 743 F.2d 775, 779 (11th Cir. 1984).

3. The Fourth Circuit's opinion, and the logic underlying it, is being relied upon by state courts, so that the pernicious effects of this error are spreading.

This Court should grant certiorari and either hear this issue along with the other issues involved in the case, or simply reverse and send the case back to the Fourth Circuit for resolution of the issues which that Court has skirted.

II

A rule of law permitting the prosecution to make affirmative use of psychiatric testimony in a case such as this forces the capital defendant to choose between his Fifth Amendment right to remain silent and his due process and Sixth Amendment rights to explore and present psychiatric evidence in mitigation of a death sentence. This Court has previously held that a criminal defendant cannot be forced to choose between his Fifth Amendment right to remain silent and his Fourth Amendment right to challenge the validity of a search. Simmons v. United States, 390 U.S. 377 (1968). Federal appeals courts have held that a criminal defendant cannot be forced to choose between his Fifth Amendment right to remain silent and his right to explore and present psychiatric evidence on the questions of competency or sanity. Gibson v. Zahradnick, 581 F.2d 75, 78 (4th Cir. 1978), and cases cited at 78. There does not appear to be any conflict among the circuits, as at least seven circuits have held that a

defendant cannot be forced to make that choice. This court has never made such a rule the law of the land, however.

The rule of Gibson v. Zahradnick, must also be explicitly made applicable in capital cases. Petitioner asks this Court to take one of two courses of action. The first course of action would be simply to remand this case back to the Fourth Circuit, informing the Fourth Circuit that Zant v. Stephens does not apply to this case, and suggesting that they consider this issue (and the other issues) on its merits. The second option would be to grant certiorari on this issue as well, and to then resolve both the general question of whether a criminal defendant may be forced to choose between his Fifth Amendment right to remain silent and his due process and Sixth Amendment rights to explore and present psychiatric evidence, and also the specific question of whether a capital defendant may be forced to choose between his Fifth Amendment right to remain silent and his due process and Sixth Amendment rights to explore and present psychiatric evidence in mitigation of his death sentence.

III

A capital defendant has a constitutional as well as a statutory right to have the sentencing jury told that they are free to impose a life sentence, even if they should find one or both aggravating circumstances and even if they should find no mitigating circumstances. Smith's trial counsel requested the trial court to instruct the jury explicitly that it could return a life sentence, even if they found aggravating circumstances but no mitigating circumstances. The court refused to do so and instructed the jury instead in a way which clearly implied that the jury was required to impose a death sentence unless it found overriding mitigating circumstances.

These instructions compromised Smith's Eighth Amendment right to an individualized determination that death is the appropriate penalty in his case. Lockett v. Ohio, 438 U.S. 586, 601 (1978). In an important line of cases concerning the Georgia statute, the Fifth and Eleventh Circuits have considered the

implications of Lockett for jury instructions on mitigation. The leading case is Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B, 1981), in which the Court invalidated instructions which failed to "clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Id. at 471.

The Fourth Circuit held that the instructions in Smith's case were constitutionally adequate, relying on its prior ruling in James Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), which explicitly rejected the rulings of the Fifth and Eleventh Circuits, and which is predicated on the view that the federal courts should avoid "detailed scrutiny of state jury instructions on collateral review." The Court implied that Zant v. Stephens had effectively overruled Spivey v. Zant,[3] in spite of the fact that the Eleventh Circuit continues to follow and apply Spivey v. Zant. See Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Moore v. Zant, 722 F.2d 640 (11th Cir. 1984); Finney v. Zant, 709 F.2d 643 (11th Cir. 1983). The Fourth Circuit seems to contend that Zant v. Stephens requires that the federal courts abandon constitutional scrutiny of state sentencing decisions in capital cases: the Fourth Circuit has suggested, for example, in James Briley v. Bass, 750 F.2d at 1243, that the Lockett principle of individualization is limited to "a right to present mitigating evidence and a ban on mandatory death penalties." Eddings v. Oklahoma, 455 U.S. 104 (1982), makes it clear that the principle also forbids any state-imposed restriction on the defendant's right to an individualized determination of the suitability of a death sentence in his case.

This court should grant certiorari on this issue for the following reasons:

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3. The Georgia Supreme Court has relied upon the Fourth Circuit's reading of Zant v. Stephens (in James Briley v. Bass), refusing to follow the teachings of Spivey v. Zant and its progeny. See Ross v. State, 254 Ga. 22, 326 S.E.2d 194, 203-205 (1985).

1. The Fourth Circuit's ruling in this case is in conflict with Spivey v. Zant, Morgan v. Zant, and other opinions of the Fifth and Eleventh Circuits.

2. The Fourth Circuit's continued belief that federal courts should avoid "detailed scrutiny of state jury instructions on collateral review" means that, at least in the Fourth Circuit and in any other jurisdiction that follows this logic, there will be no review of jury instructions;

3. The refusal of the trial court to properly instruct the jury, as required both by Virginia law and by federal constitutional law, has resulted in a fundamental unfairness to Michael Smith, which should be corrected.

IV

The Court's decision in Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), established the general principles governing the resolution of claims that criminal defendants have been denied adequate assistance of counsel under the Sixth and Fourteenth Amendments. The record in Smith's case amply demonstrates that his trial counsel performed in a constitutionally deficient manner at and in connection with the capital sentencing phase of his trial. In addition, the record shows that counsel's errors were prejudicial even under the standard established by the Court in Strickland. However, the Fourth Circuit failed to give meaningful consideration to this claim, and appears to interpret Strickland to erect a virtually insurmountable barrier to relief. This Court should grant certiorari to apply Strickland to the sentencing phase of this case and to give state and federal courts further guidance regarding the criteria for establishing a constitutional violation in this context.

## ARGUMENT

### I

PETITIONER'S DEATH SENTENCE MUST BE SET ASIDE BECAUSE IT WAS BASED, TO A DEMONSTRABLY PREJUDICIAL DEGREE, ON STATEMENTS ADMITTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

As part of counsel's search for mitigating evidence, counsel obtained permission for Dr. Wendell Pile to evaluate Michael Smith, although his report was transmitted to the court and the prosecution as well as to the defense. Dr. Pile did not warn Smith that his disclosures could be used to support a death sentence. During the evaluation, Smith described a previously undisclosed incident during which, according to him, he had assaulted, and almost raped, a girl on a school bus. Dr. Pile was not called to testify at the guilt phase of the trial, and the defense did not plan to call him at the sentencing phase, or to adduce any psychiatric evidence in mitigation. The prosecution called Dr. Pile as its witness at the sentencing phase solely to repeat Petitioner's statement about the school bus incident to prove the statutory aggravating circumstance that "there is a probability...that [Petitioner] would commit criminal acts of violence that would constitute a continuing serious threat to society." Defense counsel objected to Dr. Pile's testimony.[4] The trial judge overruled the objection.

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4. Counsel did not raise the issue on direct appeal, although it was raised and fully discussed in an amicus brief submitted by the Post-Conviction Assistance Project of The University of Virginia School of Law. The Virginia Supreme Court did not address the issue. Both the state habeas court and the federal district court regarded the claim as having been forfeited due to procedural default. Petitioner argued that the federal courts should address the merits of the claim, notwithstanding the procedural default, because counsel's failure to preserve the issue on appeal was attributable to ignorance or neglect rather than informed professional deliberation. See Carrier v. Hutto, 724 F.2d 396 (1983), aff'd en banc, 754 F.2d 520, cert. granted sub nom. Carrier v. Sielaff, 105 S. Ct. 3523 (1985), interpreting the "cause" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977).

The Fourth Circuit chose to address the merits of Petitioner's claim, implicitly ruling that Petitioner had demonstrated sufficient "cause" and "prejudice" to satisfy the requirements of Wainwright v. Sykes, and it is that resolution on the merits for which Petitioner seeks review.

The Fourth Circuit assumed that the evidence was in fact inadmissible, but then relied upon Zant v. Stephens, 462 U.S. 862 (1983), in saying that the unchallenged finding of "vileness" obviated the necessity for consideration of defects in the finding of future dangerousness.

A. Nothing in This Court's Decision in Zant v. Stephens Suggests That a Prejudicial Constitutional Defect in the Sentencing Process Should Be Ignored Simply Because the State Proved an Untainted Statutory Predicate for a Death Sentence.

1. The Fourth Circuit's Handling of the Issue.

In its opinion below, the Fourth Circuit correctly noted that the

> jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (i.e., violence) and (b) vileness. The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness". The evidence presented to the jury supporting a showing of "vileness" was unchallenged.

Slip Op. at 6-7. However, the Court's reasoning took a breathtaking leap when it concluded that the Constitution means that "any one aggravating circumstance deemed sufficient by the jury suffices," Slip Op. at 7, relying upon Linwood Briley v. Bass, 742 F.2d 155, 165 (4th Cir. 1984)[5], and Zant v. Stephens, 462 U.S. 862, 884, 77 L.Ed.2d 235 (1983).

It is certainly true that a finding of an aggravating circumstance "suffices" to establish a constitutionally adequate predicate for a death sentence if the aggravating circumstance "genuinely narrow[s] the class of persons eligible for the death penalty" and "reasonably justif[ies] the imposition of a more

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5. The Fourth Circuit's citation to its own decision in Linwood Briley v. Bass was not pertinent since Briley objected only to the phraseology of the "vileness" instruction and did not claim either that the evidence was legally insufficient to establish the circumstance or, more importantly, that otherwise inadmissible evidence had been offered to prove it. Petitioner's own case, where the defense needs access to a psychiatric examination to explore possible claims in exculpation or mitigation. In these cases, the Constitution requires more than Miranda warnings; if the defense is to have meaningful access to a psychiatric assessment, he must be assured that his disclosures to the examiner will not be used to make the prosecution's case.

severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 77 L.Ed.2d at 249-250. But the finding of an aggravating circumstance does not foreclose corstitutional scrutiny of other aspects of a sentencing hearing.

For example, the finding of an aggravating circumstance does not "suffice" to establish the constitutionality of a death sentence when the defendant was precluded from introducing evidence concerning his character or record as a basis for mitigation: Lockett v. Ohio, 438 U.S. 586 (1978), established that the defendant has a constitutional right to an individualized determination of the propriety of a death sentence. Nor does the finding of an aggravating circumstance "suffice" to establish the constitutionality of a death sentence when the sentencer considered unreliable evidence which the defendant had no opportunity to confront and cross-examine: Gardner v. Florida, 430 U.S. 349 (1977), established that the defendant has a right to a fair and reliable determination of the disputed issues in a capital sentencing proceeding.

Thus, it is clear that a finding of a valid aggravating circumstance does not "suffice" to override any and all constitutional defects in a capital sentencing hearing. In Smith's case, evidence introduced by the prosecution to prove its case-in-aggravation and to persuade the jury to impose a death sentence was constitutionally inadmissible under the Fifth Amendment, and this evidence had a prejudicial impact on the jury's deliberations. The fact that the state satisfied its burden of proving one statutory aggravating circumstance with untainted evidence does not "suffice" to erase the prejudicial impact of the constitutional error: indeed, that fact is constitutionally irrelevant to the resolution of Smith's case.

How does the Fourth Circuit explain its contrary conclusion? It fails to offer any explanation at all. In lieu of an explanation, the Court merely offers a quotation from this Court's opinion in Zant v. Stephens, 462 U.S. at 884, 77 L.Ed.2d at 254:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside ...simply because another aggravating circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

This quotation, which constitutes the sum total of the Fourth Circuit's treatment of Zant v. Stephens, was taken out of context, omits important limiting language, and fundamentally distorts this Court's ruling.

2. This Court's Ruling in Zant v. Stephens.

The issue in Zant v. Stephens, as stated by this Court, was:

> [W]hether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld.

77 L.Ed.2d at 241. The Court noted at the outset of its analysis that:

> The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

Id. at 241-242.

Stephens' death sentence had been imposed on the basis of three aggravating circumstances: (1) that Stephens had a "substantial history of serious assaultive criminal convictions"; (2) that the offense was outrageously or wantonly vile, horrible or inhuman; and (3) that the offense was committed by someone who had escaped from custody.

In support of the first circumstance, the State offered evidence concerning Stephens' prior criminal record--two counts of armed robbery, five counts of burglary, and one count of murder.

While Stephens' case was pending in the Georgia Supreme Court, that court ruled that the first aggravating circumstance was fatally vague. When Stephens' case was heard, his death sentence was affirmed by the Georgia Supreme Court on the basis of the two remaining aggravating circumstances.

The Fifth Circuit reversed, concluding that the death penalty was invalid because the jury had based its death sentence in part on an invalid aggravating circumstance. This Court summarized the Fifth Circuit's reasoning as follows:

> The Court of Appeals gave two reasons for that conclusion. First, it read Stromberg v. California, 283 U.S. 359 (1931), as requiring that a jury verdict based on multiple grounds must be set aside if the reviewing court cannot ascertain whether the jury relied on an unconstitutional ground....
>
> Second, it believed that the presence of the invalid circumstance "made it possible for the jury to consider several prior convictions of [respondent] which otherwise would not have been before it." 631 F.2d 397, 405-406 (CA5 1980).
>
> In a petition for rehearing, the State pointed out that the evidence of respondent's prior convictions would have been admissible at the sentencing hearing even if it had not relied on the invalid circumstance. The Court of Appeals then modified its opinion by deleting its reference to the possibility that the jury had relied on inadmissible evidence. It maintained, however, that the reference in the instructions to the invalid circumstance "may have unduly directed the jury's attention to his prior convictions." The court concluded, "It cannot be determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty." 648 F.2d 446 (CA5 1981).

Zant v. Stephens, 77 L.Ed.2d at 244-245.

Because the Fifth Circuit had acknowledged that no inadmissible evidence had been introduced at the sentencing hearing, this Court's reversal of the judgment hinged on two determinations -- that the Fifth Circuit had misunderstood Stromberg, and that the instruction on the improper aggravating circumstance did not materially affect the jury's deliberations.

This Court first analyzed Stromberg, finding two possibilities for error:

> [First,] a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground...
>
> [Second,] the reasoning of Stromberg encompasses a situation in which the general verdict on a single-count indictment or information rested on both a constitutional and an

unconstitutional ground.

Zant v. Stephens, 77 L.Ed.2d at 252-253.

The Court concluded that the second rule applied only to cases in which the punishment was being imposed or heightened because the defendant had exercised his First Amendment rights, and that Georgia's aggravating circumstances did not involve any constitutionally protected activity. Therefore there was no Stromberg infirmity:

> [A] death sentence supported by at least one valid aggravating circumstance need not be set aside under the second Stromberg rule simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty.[6]

Id. at 254. (emphasis added).

Having disposed of the Stromberg issue, the Court went on to consider whether the invalid instruction had a constitutionally prejudicial impact on the jury's deliberations. The Court first noted that the invalid aggravating circumstance pertained to a constitutionally permissible inquiry and that the evidence offered to prove it -- Stephens' record of criminal convictions -- was otherwise admissible under state and federal law. Thus, the alleged constitutional defect arising from the invalid circumstance related solely to the giving of the instruction itself. The question to be decided was whether the emphasis on Stephens' prior record in the invalid instruction amounted to a constitutional defect in the sentencing process. The Court concluded that it did not because an instruction directing the jury to take into account the defendant's prior record would be constitutionally permissible. Moreover, the Court observed, the Georgia Supreme Court had properly concluded that the error had "an inconsequential impact on the jury's decision." Id. at 257.

The Court meant to be taken at its word when it said, at the outset of the relevant portion of the opinion, that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court

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6. The underscored portion of this excerpt was left out of the quotation used by the Fourth Circuit in its opinion.

judgment, the severity of the sentence mandated careful scrutiny in the review of any colorable claim of error." Id. at 255. The Court carefully scrutinized the possible impact of the erroneous instruction to ascertain whether the error was of constitutional magnitude.

The critical factor in the Court's analysis was the essentially unobjectionable nature of the evidence adduced to prove the invalid aggravating circumstance -- Stephens' record of criminal convictions. The Court emphasized that 'the evidence on which the jury might have relied [concerning Stephens' prior record] was properly adduced at the sentencing hearing", id. at 256, and that "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be inappropiate to take account of a defendant's prior criminal record in making sentencing determinations...." Id. at 257. In other words, the Court emphasized that there was no independent constitutional defect in the proceedings. The Court explicitly endorsed the observation of the Georgia Supreme Court that "[a] different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and therefore the circumstance failed." Id. at 258, quoting 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982). Moreover, the Court also noted that counsel for the State of Georgia had acknowledged that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." 77 L.Ed.2d at 256, n.24. Finally, the Court specifically emphasized the limited nature of its holding when it stated that "[w]e need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." Id.

In Michael Smith's case, the jury's finding of an aggravating circumstance and its decision to recommend a death sentence were demonstrably influenced by constitutionally inadmissible evidence. Unlike the instructional error in Zant v.

Stephens, the admission of Dr. Pile's testimony in violation of the Fifth Amendment "can [] fairly be regarded as a constitutional defect in the sentencing process." Id. at 257. Nothing in Zant v. Stephens even remotely suggests that the federal courts should ignore an evidentiary error of independent constitutional magnitude simply because an untainted finding establishes an adequate statutory predicate for a death sentence.

The Fourth Circuit's reading of Zant v. Stephens is both breathtaking in its implications and unprecedented. Under the Fourth Circuit's interpretation, any evidentiary error, no matter how prejudicial in fact, would be regarded as constitutionally harmless unless it tainted every aggravating circumstance.[7] Petitioner has been unable to identify any other case relying upon a similar interpretation. This Court should grant certiorari and reverse this erroneous judgment of the Fourth Circuit.

B. Dr. Pile's Testimony was Inadmissible as Being a Violation of Smith's Fifth Amendment Privilege Against Self-Incrimination.

When the trial judge allowed Dr. Pile's testimony, he was presumably relying on Gibson v. Commonwealth, 216 Va. 412 (1975), under which the testimony was clearly admissible. In that case, Gibson was charged with killing his estranged wife and father-in-law. Several days later he was hospitalized at Central State Hospital for psychiatric treatment and for evaluation of his competency to stand trial and his mental state at the time of the offense. During his evaluation at Central State, he discussed the crime. At his trial, the Commonwealth called a Central State psychiatrist, solely to relate the incriminating

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7. Consider, for example, the error occurring in Estelle v. Smith, 451 U.S. 454 (1981), where psychiatric testimony was unconstitutionally admitted to prove a future dangerousness circumstance identical to that found in the Virginia statute. In Texas, the dangerousness finding is a necessary predicate for a death sentence and is also the vehicle for introduction of mitigating evidence. However, suppose that the facts occurring in Estelle v. Smith had occurred in Virginia -- the same surprise examination without notice to counsel and without any effort to protect Smith's right not to "be made the 'deluded instrument' of his own execution." 451 U.S. at 462. Would this Court have regarded the violation of Smith's Fifth Amendment rights as harmless simply because the jury found both dangerousness and vileness as aggravating circumstances?

statements made by Gibson during the evaluation. The psychiatrist testified, over objection, that Gibson had told him he remembered going to his father-in-law's house and shooting him but that he did not remember anything thereafter. The Virginia Supreme Court upheld Gibson's conviction, stating:

> Whether an accused consents or is required to submit to a psychiatric examination, if during the examination he is not compelled to answer questions concerning the offense with which he is charged, there is no violation of his right against self-incrimination.

216 Va. at 414 (emphasis in original).

In Gibson v. Zahradnick, 581 F.2d 75, 80 (4th Cir. 1978), the Fourth Circuit set aside Gibson's conviction, holding that the admission of the defendant's statements to the psychiatrist violated his Fifth Amendment rights:

> An incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant of the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity [at the time of the offense].

The rationale for the Fourth Circuit's holding in Gibson is that the defendant, especially if he is indigent, cannot adequately explore possible psychological defenses unless the psychiatric examiners are free to make a full inquiry concerning the circumstances of the offense or any prior related offenses. In such cases, counsel must have the benefit of a clinical investigation and assessment before any intelligent decision can be made about pursuing psychiatric defenses. As Judge Haynesworth explained in Gibson:

> Defense counsel had no other choice than to request an examination. His client was in obvious need of a psychiatric examination and psychiatric treatment. Defense counsel would have been subject to censure if he had not done what he did. Exercise of his client's right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of his constitutional privilege against self-incrimination.

Id. Given the need for psychiatric evaluation, Judge Haynesworth emphasized that the evaluation must be conducted under circumstances that will make it worthwhile:

> The Commonwealth and the Defendant may both be in substantial need of expert testimony on the issue of sanity. The most dependable and reliable testimony by psychiatrists would be unobtainable in many cases unless they were free to inquire into the prior aberrant conduct of the defendant, including his participation in the criminal activity with which he is charged.

Id. at 79.

The right to psychiatric evaluation and assistance -- so critically important to the provision of adequate assistance of counsel and a fair balance in the adversary process -- would be altogether nullified if the price of obtaining such an evaluation were a surrender of the defendant's privilege against self-incrimination.[8]

The Fourth Circuit's ruling in Gibson reflects the prevailing doctrine, whether prescribed by statute, court rule or case law, in virtually every state and in the federal courts -- the prosecution may not use any statements made by the defendant during a psychiatric evaluation as proof of guilt, and the defendant's statements are admissible only if the defendant puts his mental conditon in issue by raising a psychiatric defense, and then only on that issue. See, e.g., United States v. Reifsteck, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1052 (3d Cir. 1975). See generally, American Bar Association Standards for Criminal Justice (Mental Health-Criminal Justice Standards), Chapter 7, Standards 7-3.2, 7-3.3, 7-6.4 (1984); Slobogin, "Estelle v. Smith: The Constitutional Contours of The Forensic Evaluation," 31 Emory L.J. 71 (1982).

This Court has not yet held, as did the Fourth Circuit in Gibson v. Zahradnick, that the state may not condition access to mental health assistance on a waiver of Fifth Amendment

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8. This Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), prohibited affirmative prosecutorial use of psychiatric testimony derived from a competency-to-stand-trial evaluation ordered by the court without notice to, or consent by, defense counsel. In that case, the examiner was an agent of the prosecution, and such blatant infringements of the Fifth Amendment will be foreclosed as a result of the Court's holdings that counsel must be notified and the defendant must be warned before any such evaluation is conducted.

privileges,[9] but two recent decisions have recognized the necessity for, and the constitutional right to, assistance to the defendant and his counsel by a mental health professional so that the defense can effectively and intelligently investigate and prepare for trial. Estelle v. Smith, 451 U.S. 454 (1981), effectively bars the prosecution from using pre-trial psychiatric evaluations as an investigative tool in cases in which the defense has not sought an evaluation. Ake v. Oklahoma, ___ U.S. ___ , 84 L.Ed.2d 53 (1985), recognized the indigent defendant's need for access to a competent psychiatric evaluation for the purpose of exploring potential psychiatric defenses.

The Fourth Circuit had no reason to discuss capital sentencing proceedings in Gibson, but the principle recognized in Gibson is directly applicable to the sentencing phase of a capital case. This Court held in Estelle v. Smith that the Fifth Amendment is applicable in capital sentencing proceedings: "We can discern no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63. In a capital sentencing proceeding, the prosecution's proof of its case-in-aggravation is the functional equivalent of its proof of the elements of a criminal offense at the guilt stage. Id. at 466. Moreover, a capital defendant requires access to a psychiatric evaluation and assessment because his case in mitigation will typically rest on a foundation of psychiatric testimony.

In Virginia, in order to establish the evidentiary predicate for the death penalty, the Commonwealth has the burden of proving either of the two aggravating circumstances (future dangerousness or "vileness") beyond a reasonable doubt.

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9. Of course, once the defense decides to raise a psychiatric defense and gives notice of this intent, the prosecution is entitled to have access to the defendant for a psychiatric evaluation. See cases cited in Estelle v. Smith, 451 U.S. at 465-66. However, disclosures made during such an evaluation may be used only to rebut claims raised by the defense, not to prove any unrelated elements of the prosecution's case. See generally, American Bar Association Criminal Justice-Mental Health Standards, Standards 7-3.4, 7-6.4 (1984).

Accordingly, it follows from the constitutional principle recognized in Gibson that the prosecution may not use against a defendant, as part of its case-in-aggravation in a capital sentencing proceeding, any incriminating statements made by the defendant during the course of a psychiatric evaluation; psychiatric evidence obtained during such an evaluation is admissible only if the defendant puts his mental condition in issue to prove mitigating circumstances, and then only on the issues raised, not on any unrelated issues in aggravation.[10] Accord, Battie v. Estelle, 655 F.2d 692, 700 (5th Cir. 1981) (holding that a psychologist's testimony diagnosing defendant as a sociopath likely to follow a violent career was constitutionally inadmissible "where the defense neither requested an examination on future dangerousness nor introduced psychiatric or psychological testimony on that issue"[11]).

In its briefing and argument before the Fourth Circuit, the Commonwealth conceded that the Fifth Amendment precludes the prosecution from introducing, as part of its case-in-chief (to prove a defendant's guilt or to prove aggravating circumstnaces in a capital case) statements elicited from the defendant during

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10. In some cases, the issues may be so intertwined that testimony concerning a mitigating circumstances may also tend to prove an aggravating circumstance, or may open the door to such testimony, but the central constitutional principle recognized in Gibson is that the decision to open the door to psychiatric testimony, in light of its evidentiary risks, should be controlled by the defense. Be that as it may, no such double-edged sword problem was presented in Smith's case. Dr. Pile's testimony was not relevant to any claim in mitigation raised by the defense.

11. In Battie, the Fifth Circuit also pointed out that the examiner, who conducted the evaluation upon defense request, "did not advise Battie of his Fifth Amendment privilege." 655 F.2d at 700. Neither did Dr. Pile in Smith's case. However, for the reasons discussed in the text, this is not the critical variable. Whether or not the defendant is warned, his Fifth Amendment right cannot be "waived" by talking to the psychiatrist, but only by putting his mental condition in issue at trial.

The Commonwealth had also claimed in Gibson that the defendant's disclosures had been voluntary. Judge Haynesworth noted, in response, that Gibson had not been adequately warned in any event but went on to emphasize that such a warning would not have vitiated the constitutional defect in the process: "We do not mean to imply that if a defendant were given a full Miranda warning, an incriminating statement made by the defendant during the ensuing psychiatric examination could be used at trial to prove the defendant's guilt." Id. at 79, n.1.

a psychiatric evaluation conducted for the state. However, the Commonwealth argued that the prosecution is not constitutionally precluded from introducing this same incriminating evidence if the evaluation was conducted at the request of the defense, even if the defendant has not put his mental condition in issue. Apparently, the Commonwealth's theory is either that a defendant waives his Fifth Amendment rights by requesting a psychiatric evaluation and talking to the examiner,[12] or that the Fifth Amendment is not implicated at all when an evaluation is conducted for the defense. The Commonwealth reasons that a defendant who makes incriminating disclosures to an examining psychiatrist has simply "confided to a friend" and "must suffer the consequences if the friend later betrays the confidence" (quoting Conquest v. Mitchell, 618 F.2d 1053, 1056-57 (4th Cir. 1980) (Haynesworth, C.J., concurring).

The central flaw in this reasoning is that a mental health professional conducting a pre-trial forensic examination for the defense in a criminal case is not merely a friend in whom the defendant has chosen to confide. Instead, the examiner is serving an essential constitutional function in assisting the defendant to explore the availability of clinical evidence in exculpation or mitigation. As this Court recently stated in Ake v. Oklahoma, ___ U.S. ___, 84 L.Ed.2d 53, 66 (1985):

> When the state has made the defendant's mental condition relevant to his criminal culpability and to the panishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defenss.

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12. This position was also reflected in the ruling of the state habeas judge who concluded, as he had at trial, that Smith's disclosures were voluntary and that he had waived the protections of the Fifth Amendment privilege by requesting the evaluation and speaking to Dr. Pile:

> [T]he court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

Accordingly, the Court held in Ake that upon a proper showing of need, the state must assure an indigent defendant

> access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.

Id.

As noted above, the defendant's right to have access to a clinical evaluation of his mental condition would be undermined if he were required to sacrifice his privilege against self-incrimination simply by requesting or submitting to the evaluation. Indeed, many courts have held that a psychiatrist who evaluated a criminal defendant at the behest of his attorney is serving as an agent of the attorney, and that disclosures made by the client in that context are protected by the attorney-client privilege just as if they had been made to the attorney heimself or herself. See, e.g., United States v. Alvarez, 519 F.2d 1036, 1045-47 (3rd Cir. 1975). See generally Slobogin, "Estelle v. Smith and the Constitutional Contours of the Forensic Evaluation," 31 Emory L. J. 71, 127-135 (1982).

Ake v. Oklahoma holds that an indigent defendant is entitled to state-subsidized clinical assistance in any case in which a serious question may be raised about his mental condition in exculpation or in mitigation of a death sentence. It seems clear that this evaluation must be conducted within the framework of the attorney-client relationship and that any disclosures made by the defendant to the expert are insulated from disclosure to, or use by, the prosecution, at least until the defendant puts his mental condition in issue.

In its brief in the Fourth Circuit, the Commonwealth relied on Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), where the prosecution called a psychiatrist who had been retained by the defense to testify that the defendant had claimed amnesia concerning the crime. The testimony was introduced to contradict Smith's alibi that he did not commit the murder but was at home "sleeping off a drunk." The Eleventh Circuit ruled that the protections of Estelle v. Smith, 451 U.S. 454 (1981), "do not apply unless the psychiatrist is 'essentially an agent of the

state...'" Id. at 1259. While the Eleventh Circuit was correct in ruling that Miranda warnings are not required in this context, it failed to recognize that the defendant's Fifth and Sixth Amendment interests were nonetheless implicated by the psychiatric evaluation.[13]

In Smith v. Wainwright, the defendant had apparently obtained the psychiatric expert with his own funds. For this reason, the court found it difficult to regard the psychiatrist as an "agent of the state" or to see how the Fifth Amendment was implicated. What the Eleventh Circuit overlooked was that the psychiatrist was the agent of the defense and that the defendant's interest against self-incrimination was subsumed within his Sixth Amendment (and due process) rights to assistance of counsel and to the assistance of experts in exploring available defenses.

Turning to Michael Smith's case, Dr. Pile was appointed by the Court at the request of the defense. However, the relationship was not structured so as to make Dr. Pile an agent of the defense. Instead, it was clear that Dr. Pile's report would be sent to the prosecution and the trial court as well as to the defense. Thus, whether or not Dr. Pile was an "agent of the state" in the usual sense, Smith's privilege against self-incrimination was already at stake in the evaluation. This is what the Fourth Circuit had so explicitly recognized in Gibson v. Zahradnick, 581 F.2d 75, 80 (4th Cir. 1978) when it stated that:

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13. The result in Smith v. Wainwright may be correct, but not for the reasons given by the Court. Disclosures made by a defendant to a psychiatrist retained by (or appointed for) the defense are protected by the Fifth and Sixth Amendments, and the prosecution may not have access to or use the information derived from such evaluations. However, if the defendant puts his mental condition in issue, some courts have ruled that he waives his constitutional protection and that any expert who evaluated him may be called by the prosecution to rebut expert testimony offered in his behalf. See, e.g., Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976); contra, United States v. Alvarez, 519 F.2d 1036, 1046 (3rd Cir. 1975). If accepted, this principle could be extended to permit the prosecution to use information derived from a defense-initiated psychiatric evaluation to impeach his own testimony if he chooses to testify.

> an incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination, and whether it was had for the purpose of determining competency to stand trial or sanity [at the time of the offense]. [Emphasis added]

Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), is virtually identical to Smith's case in this respect. Upon defense motion, the trial court appointed a psychiatrist and psychologist to determine whether Battie was competent to stand trial and whether he was insane at the time of the crime. The psychologist submitted his report to the trial judge. The reports were then sent to the prosecution and the defense. The psychiatrist was not called to testify by either party; however, the psychologist was called by the prosecution at the sentencing phase of Battie's trial to testify that Battie was a sociopath who would continue to pose a danger to society. The Fifth Circuit held that the testimony was constitutionally inadmissible. First, the Court noted, Battie was in the state's custody and the psychologist "had been appointed by the state trial court to conduct the examination and therefore the custodial interrogation was conducted by an agent of the state." Id. at 699-700. Second, the Court concluded that Battie had not waived his Fifth Amendment privilege "by requesting a psychiatric examination to determine his competency to stand trial and his sanity at the time of the commission of the crime." Id. at 700-701. The Court then rejected the state's contention that "a defendant's mere submission to a psychiatric or psychological examination constituted a waiver of the Fifth Amendment privilege."[14]

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14. The Fifth Circuit concluded that Battie was indistinguishable from Estelle v. Smith, notwithstanding the fact that Battie had requested the evaluation. Accordingly, because Battie had not been warned that his disclosures would be used against him, the Court set aside the sentence under Estelle v. Smith. However, it should be clear that the outcome in Battie does not properly turn on whether or not warnings were given. Battie was constitutionally entitled to a psychiatric evaluation; he did not waive his Fifth Amendment rights by requesting or participating in the evaluation; and the prosecution's use of the disclosures would have been constitutionally permissible only if they had been relevant to an issue raised by the defense. Because Battie did not introduce psychiatric or psychological testimony to disprove dangerousness, prosecutorial use of the psychologist's testimony was constitutionally impermissible.

In sum, affirmative prosecutorial use of disclosures made by a defendant during a psychiatric evaluation is constitutionally impermissible. Who requested the evaluation is pertinent only in identifying the constitutional basis for the barrier against prosecutorial use of the psychiatric testimony, not in determining whether the barrier exists. In Smith v. Wainwright, it seems appropriate to characterize the prosecution's use of the defendant's disclosures to the psychiatrist as a violation of the Fifth Amendment. Whatever the characterization, however, the underlying principle is the same -- the defendant needs access to a psychiatric evaluation to defend himself, and his right to defend himself is severely compromised, if not completely undermined, if he must surrender his privilege against self-incrimination as the price for exploring possilbe defenses in exculpation or mitigation.

C. The Record Demonstrates that the Constitutionally Inadmissible Testimony by Dr. Pile Influenced the Jury's Decision to Impose Petitioner's Death Sentence.

Dr. Pile's testimony was demonstrably prejudicial. The prosecution relied on Dr. Pile's description of the school bus incident in its closing argument, to support its claim that Smith would be a continuing threat to society and that a death sentence was necessary to incapacitate him. In addition to the capital offense, Smith had been convicted of a previous rape. The self-admitted incident on the school bus added a third behavioral predicate for the prediction. Instructed by the trial court to return specific factual findings with respect to the aggravating circumstances, the jury found the aggravating circumstance of "dangerousness." Moreover, the jury's questions, both during trial and during its deliberations, demonstrate that the dangerousness issue played a determinative role in its decision to recommend the death penalty. Two jurors interrupted Dr. Dimitris' testimony to ask about the different prognostic implications of Dr. Pile's diagnosis and his own. In addition, the jury suspended its deliberations to return to court and ask the

trial judge to explain the incapacitative consequences of a life sentence.

Dr. Pile's testimony was not merely cumulative. The involuntary confession determined to be harmless beyond a reasonable doubt in Milton v. Wainwright, 407 U.S. 371 (1972), was indeed cumulative -- the prosecution had also introduced two written confessions by the defendant together with statements which he had made when he reconstructed the crime for the police at the scene of its occurrence. This evidence was practically redundant on the same factual issue. In contrast, Dr. Pile's testimony was introduced to provide an additional factual predicate for the prediction of future dangerousness which the jury was urged to make and from which it was urged to infer a need to incapacitate Smith by executing him. Surely in this context it cannot be said that the error was harmless beyond a reasonable doubt.[15]

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found the Petitioner to be "dangerous." However, in light of the prosecution's closing argument and the jurors' questions, the record demonstrates a substantial likelihood that its finding of dangerousness tipped the balance leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the sentence of death was based, to a determinative degree, on its finding of dangerousness, a finding clearly influenced by Dr. Pile's inadmissible testimony.

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15. It is noteworthy that neither Judge Carneal nor the federal magistrate found that this error was not prejudicial.

II

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT AND IN CONNECTION WITH THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL.

Petitioner has raised a number of claims of ineffective assistance of counsel in his Petition for Writ of Habeas Corpus. We have, in effect, abandoned some of the aspects of the claim originally alleged in the Petition, leaving the following allegations of ineffectiveness:

1. Counsel failed to take adequate steps to protect Smith's Fifth Amendment privilege against self-incrimination in connection with statements made during pre-trial psychiatric examinations and subsequently used by the Commonwealth as part of its case-in-aggravation at the sentencing phase.

2. Counsel failed to prepare adequately for cross-examination of Dr. Pile at the sentencing stage, failed to conduct a competent cross-examination, and questioned Dr. Pile in a way which elicited highly prejudicial and unreliable testimony.

3. Counsel failed to conduct an adequate investigation concerning the existence of the mitigating mental abnormalities specified in Va. Code Ann. § 19.2-264.4(B).

A. Petitioner Must Demonstrate That Counsel's Representation Was Not "Within The Range Of Competence Demanded Of Attorneys In Criminal Cases," And That "There Is A Reasonable Probability" That Michael Smith Would Have Received A Life Sentence If Counsel's Performance Had Not Been Constitutionally Defective.

In Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), the Supreme Court reaffirmed and refined the standard for ineffective assistance of counsel first enunciated in McMann v. Richardson, 397 U.S. 759 (1970). Under McMann v. Richardson, the test for effective assistance is whether counsel's performance "was within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770-71.

The record amply demonstrates that Smith's trial counsel performed in a constitutionally deficient manner in the three respects outlined above. In addition, the record shows that counsel's errors were prejudicial even under the demanding

standard articulated by the Supreme Court in Strickland:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

80 L.Ed.2d at 694.

B. Counsel Failed To Protect Smith's Fifth Amendment Privilege Against Self-Incrimination In Connection With Statements Made During Pretrial Psychiatric Examinations And Subsequently Used By The Commonwealth As Part of Its Case-In-Aggravation At The Sentencing Phase Of Trial.

The trial record and the testimony at the evidentiary hearing show that Mr. Pugh made the decision to seek psychiatric evaluation, and advised Smith regarding his conduct during these evaluations. The record also shows that Mr. Pugh never appreciated the serious and patent conflict between his efforts to explore possible psychiatric "defenses," in exculpation or mitigation, and his advice to Smith to remain silent regarding the circumstances of the offense and any prior offense.

Mr. Pugh testified that the circumstances of the offense and Smith's demeanor alerted him immediately to the need for a comprehensive psychiatric evaluation of Smith's personality and mental condition at the time of the alleged offense. He therefore sought the evaluation at Central State Hospital and, dissatisfied with the results of this evaluation, he requested another evaluation by Dr. Pile.

Yet, at the same time, Mr. Pugh said he had advised Smith not to discuss the offense or any prior offenses "with anyone". Although it is not clear whether Mr. Pugh specifically advised Smith to remain silent regarding these possibly incriminating matters before each of the respective examinations, he testified that his general advice had been for Smith to remain silent, and that he did not expect Smith to discuss the offense or prior offenses with either examiner. To be sure that Smith would remain silent, Mr. Pugh should have given him careful and explicit advice immediately prior to the examinations. This was especially true with regard to Dr. Pile's examination, since Mr.

Pugh knew that Smith had been totally open with Dr. Dimitris. Yet Mr. Pugh did not communicate with his client before Dr. Pile's examination, did not accompany him there and did not discuss the matter with Dr. Pile to clarify the purposes and scope of the evaluation.

Most importantly, Mr. Pugh did not recognize the inconsistency between his advice, had it been followed, and his efforts to explore possible psychiatric defenses. He testified at the evidentiary hearing that it had not occurred to him that it is not possible[16] for a psychiatric examiner to render an opinion regarding a person's mental state at the time of an alleged offense if the defendant refuses to discuss the offense at any prior related conduct. Had he realized this, he would undoubtedly have considered seeking a protective order from the court to enable him to investigate possible "defenses"--in exculpation or mitigation--based on psychological abnormality without sacrificing or compromising his client's Fifth Amendment rights. Appreciation of this dilemma, and efforts to resolve it, would be expected as being "within the range of competence demanded of attorneys in criminal cases," McMann, supra, at (770-771), especially in capital cases. Conversely, failure to recognize the problem, and, therefore, to take any steps to resolve it, constitutes an "error so flagrant that a court can conclude that it resulted from neglect or ignorance rather from informed professional deliberation." Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied.

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16. A forensic psychiatrist cannot give an informed opinion about a defendant's mental functioning at the time of an offense if the defendant declines to discuss his recollection about the circumstances before, during and after the offense. Dr. Showalter so testified. See also Gibson v. Zahradnick, supra, at 79. However, an examiner may be able to determine, on the basis of history and a clinical interview, whether or not the defendant exhibits any signs of gross psychopathology. Thus, even if the defendant does not discuss the circumstances of the offense, it may be possible to rule out a mental disease or defect which is prerequisite to assertion of an insanity defense. This was the import of Dr. Dimitris' testimony at the evidentiary hearing. On the other hand, unless the defendant reveals the circumstances of the offense, an examiner will not have enough information on which to base an expert opinion regarding a defendant's actual functioning at the time of the offense. Without such an opinion, a defendant cannot establish a psychiatric case in mitigation under the capital sentencing provisions.

While the state habeas judge and the magistrate both recognized the force of this claim, each concluded that counsel's acknowledged failure to take appropriate action to protect Appellant's Fifth Amendment interest in connection with the psychiatric evaluation was not of constitutional magnitude.[17] Their legal conclusions are patently erroneous, and, as legal conclusions, are entitled to no presumption of correctness under Sumner v. Mata, 449 U.S. 535, 551 (1981).

Counsel's error was obviously prejudicial even under the Strickland standard.[18] The prosecution relied on the evidence in its closing argument, and it contributed substantially to the proof of future dangerousness. Moreover, if Dr. Pile had not been permitted to testify for the prosecution, he would not have testified at all: Appellant's counsel would not then have blundered into disastrous cross-examination.

C. Smith's Trial Attorneys Failed To Prepare Adequately For Cross-Examination Of Dr. Pile At The Sentencing Stage, Failed To Conduct A Competent Cross-Examination, And Questioned Dr. Pile In A Way Which Evoked Highly Prejudicial, Unreliable Testimony.

1. Due to inadequate preparation, counsel's cross-examination of Dr. Pile was clearly incompetent.

At the sentencing hearing, the Commonwealth called Dr. Pile only to ask him about Smith's statements regarding the school bus incident. The Commonwealth's Attorney did not ask Dr. Pile any questions concerning his diagnosis or his prognosis.

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17. Judge Carneal acknowledged that Gibson v. Zahradnick and Smith v. Estelle established the predicate for Appellant's claim: he simply concluded that the premise on which these decisions were based - that an adequate reconstruction of the defendant's mental condition at the time of the offense requires the cooperation of the defendant - was erroneous. Unlike Judge Carneal, the magistrate recognized that counsel's desire for their client to remain silent about the offense and their need to explore psychiatric evidence caught them "in a practical dilemma." However, he concluded, without elaboration, that counsel's failure to do anything to resolve the dilemma was "not ineffective."

18. Neither Judge Carneal nor the magistrate found that this error was not prejudicial.

Had he done so, an adequately prepared defense attorney would have objected to the admission of such testimony on a variety of grounds:

1. Such conclusions, based entirely on Smith's own statements, would violate Appellant's Fifth Amendment rights for the reasons subsequently stated by this Court in Estelle v. Smith, 451 U.S. 454 (1981), and implied by The Fourth Circuit in Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978).

2. Since Smith had offered no psychiatric testimony and had not put his own mental condition in issue, either in mitigation or negation of the aggravating circumstances, the testimony was not relevant. See Estelle v. Smith, 451 U.S. at 466.

3. In light of the unreliability of psychiatric diagnosis of character disorders and the entirely speculative nature of the prediction of future violence, psychiatric opinion testimony is not admissible on this issue.[19]

4. Even if the proffered testimony were not privileged, were relevant and could be the subject of an expert opinion, Dr. Pile would not qualify as an expert to offer such an opinion, because his examination was insufficient and because he was not a forensic psychiatrist.

Perhaps for these reasons, the Commonwealth's Attorney did not ask Dr. Pile about his diagnosis. On cross-examination, however, Mr. Pugh stepped into the shoes of the prosecution:

> Q. Doctor Pile, in your diagnosis what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopath personality, sexual deviation, rape.

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[19] Many courts, most notably the Fifth Circuit in Smith v. Estelle, 602 F.2d 694 (1979), have found that predictions of future dangerousness are so unreliable that they should not be admitted. Id at 699-700, n.7. This Court concluded that such evidence may have some reliability, and therefore there should be no constitutional rule barring such expert testimony. Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1108 (1983). However, it should be noted that Texas furnishes expert assistance to indigent defendants as a matter of right, see 77 L.Ed.2d at 1108, n.5. Both Justice White, writing for the majority, and Justice Blackmun, in dissent, envision a "battle of experts," id. at 1131 (Blackmun, dissenting). The truth-seeking function of the "battle," however, is defeated when defense counsel, through their ignorance, in effect convert "their" expert into the prosecution's most damaging witness.

Q. What is that?

A. A person who--is also described as an antisocial personality. They're all sort of the same type of--of personality disorder. The basically people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of--of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

App. 55-56.

Mr. Pugh knew that Dr. Pile's diagnosis was not supported by an adequate evaluation. Asked at the habeas hearing why he had nonetheless asked Dr. Pile about his diagnosis, Mr. Pugh could offer no explanation.[20]

If Dr. Pile's testimony had been elicited by the prosecution, an adequately prepared defense attorney would have had no difficulty impeaching the witness on cross-examination. Dr. Pile's one-hour interview with Smith, not supplemented by other information, was inadequate to provide the necessary clinical predicate for a diagnosis of antisocial personality disorders. Dr. Showalter and Dr. Dimitris, experts in forensic psychiatry, testified at the evidentiary hearing that the

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[20] In his Findings and Conclusions, Judge Carneal speculates about possible strategic motivations for Mr. Pugh's questioning of Dr. Pile, and suggests that Mr. Pugh may have been attempting to establish that sociopathy constitutes a mitigating mental abnormality under § 19.2-264.4(B) and that this condition was treatable. While this may, indeed, have been Mr. Pugh's strategy, minimally adequate preparation would have revealed that sociopaths do not have compulsions to commit crimes, that the condition is not characterized, clinically, as an emotional illness or sickness, and that the general clinical dictum is that sociopaths are not good candidates for therapy. See Dr. Dimitris' trial testimony, in response to jurors' questions.

It is abundantly clear from the trial record that there was no conceivable value in Dr. Pile's testimony, and that Petitioner's case-in-mitigation had to be built on Dr. Dimitris' testimony. Moreover, Judge Carneal's suggestion that aspects of Dr. Pile's testimony "actually weighted in Petitioner's favor" is wholly inconsistent with the jurors' questioning of Dr. Dimitris, and with the closing argument of the Commonwealth's Attorney.

information available to Dr. Pile was clinically insufficient to support his diagnosis.[21]

Moreover, Dr. Pile's speculative statements about how sociopaths "usually" behave and about the intractability of the condition clearly lack a scientific foundation, as Dr. Showalter testified at the evidentiary hearing:

> [t]here is no valid or reliable study that correlates a diagnostic, any diagnostic entity with specific type of deterioration or any particular types of violent acts or dangers.

The American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual 30 (1974) stated:

> In summary, the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence in unproved. Close monitoring, frequent follow-up, and a willingness to change one's mind about treatment recommendations and dispositions for violent persons, whether within the legal system or without, is the only acceptable practice if the psychiatrist is to play a helpful role in these assessments of dangerousness.

There was ample legal literature available at the time of trial discussing the unreliability of such statements concerning future violence. See, e.g., Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness, 55 Tex.L.Rev. 1343 (1977); Dix, The Death Penalty, Dangerousness, Psychiatric Testimony and Professional Ethics, 5 Am. J. Crim. L. 151 (1977); Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa.L.Rev. 439 (1975). Many more authorities are cited in Smith v. Estelle, 602 F.2d at 699, n.7; many of those authorities would have been available to counsel, had counsel looked.

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21. In his Findings and Conclusions, Judge Carneal stated [App. 73], "As to Petitioner's contention that Dr. Pile's one-hour examination constituted [an] insufficient clinical predicate for his diagnosis, I find that the expert opinion was equivocal and in basic disagreement over this point." Judge Carneal's finding is clearly contrary to the overwhelming weight of the evidence, taken both as a whole and in the context of specific questions which squarely posed the question to the two expert witnesses. It was therefore not entitled to the deference which the magistrate accorded it.

A review of any basic psychiatry text would have exposed the insufficiency of the clinical predicate for Dr. Pile's diagnosis of sociopathy. See, e.g., Winoker and Crowe, Personality Disorders, in 2 Comprehensive Textbook of Psychiatry 1279, 1294 (A. Freedman, et al., eds.)(2d Ed. 1975). However, Mr. Pugh testified that no member of the defense team ever reviewed any psychiatric literature; they did nothing to prepare their cross-examination of the two psychiatrists.

In Smith v. Estelle, 602 F.2d at 701, the Fifth Circuit commented that Dr. Grigson's "surprise" testimony regarding his diagnosis of sociopathy carried "no assurance of reliability whatsoever" because it was not effectively cross-examined (an issue not reached in the Supreme Court's opinion). Thus, the court held that it was error to admit such testimony when offered by the prosecution. It follows, as the district court in Smith v. Estelle observed, that if admitting Dr. Grigson's testimony was not error, defense counsel provided ineffective assistance in failing to impeach it on cross-examination. 455 F. Supp. at 658 n.16. In this case, defense counsel's representation was flagrantly inadequate because they elicited this highly prejudicial, unreliable testimony themselves. Adequately prepared counsel would have asked Dr. Pile no questions at all. Instead, counsel attempted, without any preparation, to cross-examine an expert witness in an area with which he was altogether unfamiliar.

In sum, the decision to cross-examine Dr. Pile without having researched ways to impeach his testimony is itself an error "so flagrant that a court could conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." Marzullo, supra, at 544. Similarly, counsel's decision to "cross-examine" Dr. Pile by asking him exactly those questions which would have been objectionable had they been asked by the Commonwealth's Attorney is a mistake with no possible strategic motivation. It, too, was an error of neglect or ignorance rather than an error of informed, professional deliberation. Counsel's efforts were clearly not within the

range of competence of criminal lawyers, and Michael Smith was denied effective assistance of counsel.

2. Counsel's incompetent cross-examination was demonstrably prejudicial.

The trial record demonstrates clearly that the jury relied on Dr. Pile's testimony and was encouraged to do so by the Commonwealth's Attorney, who emphasized to the jury that defense counsel had himself elicited this damaging testimony.

> Now Dr. Pile was asked, I didn't ask him. All I asked him was about the acts that were committed on the bus. Mr. Wood and Mr. Pugh asked him about his diagnosis. Certainly Dr. Pile and Dr. Dimitris agreed on the diagnosis. I didn't ask Dr. Pile what his diagnosis was, they did...

The Commonwealth's Attorney cited Dr. Pile's testimony, and argued that this evidence would be enough, on its own, to warrant imposition of the death penalty.

The jury was obviously extremely interested in the different prognostic implication of the diagnoses of inadequate personality and sociopathic personality: Juror Renz and Juror Robertson interrupted Dr. Dimitris' testimony to ask about the diagnoses. This demonstrated interest strongly suggested that Dr. Pile's unreliable diagnosis, incompetently elicited by defense counsel on cross-examination, played a determinative role in the jury's deliberations. Instructed by the court to return specific factual findings with respect to the statutory aggravating circumstances, the jury clearly found the aggravating circumstance of "dangerousness." This is clear because the jury did not strike out dangerousness on the verdict form, even though it did delete the circumstance of "depravity of mind". Also, the persistent questions from the jurors during the hearing and during the deliberations (regarding the incapacitative consequences of a life sentence) demonstrate that the dangerousness factor also played a conclusive role in the jury's decision "to recommend" the death penalty.

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found Smith "dangerous." However, in light of the prosecution's closing argument and the jurors' questions, this Court must assume, at

the least, that its findings of dangerousness tipped the balance leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the sentence of death was based, to a determinative degree, on its finding of dangerousness, a finding clearly influenced by Dr. Pile's unreliable testimony. There is a "reasonable probability" that, but for counsel's incompetent cross-examination of Dr. Pile, the results of the proceeding would have been different. Strickland v. Washington, 80 L.Ed.2d at 694.

D. Counsel Failed To Conduct An Adequate Investigation Concerning The Only Available "Defense" In The Capital Sentencing Phase Of His Trial--Whether Smith Suffered From Mitigating Mental Abnormalities As Set Forth In Va. Code Ann. § 19.2-264.4(B).

In most capital cases, the defendant's sole "defenses" at the capital sentencing phase of this trial are likely to be the mitigating mental abnormalities defined in Va. Code Ann. § 19.2-264.4(B). The threshold of clinical and legal significance of mitigating mental abnormality is much lower in this context than it is for legal insanity under the M'Naghten and irresistible impulse rules. Neither of the two mitigating circumstances specified in the statute requires a "mental disease or defect":

> 1. Whether "the capital felony was committed under the influence of extreme or emotional disturbance"; or
>
> 2. "Whether, at the time of the commisison of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired."

These two clinical questions, based on the American Law Institute's Model Penal Code, § 210.6 (Official Draft 1962), have no parallel in any other area of the criminal law in Virginia.

Recognizing the need for psychiatric testimony in mitigation, trial counsel arranged for two psychiatric evaluations, first by the Forensic Unit at Central State Hospital and then by Dr. Wendell Pile. However, neither examiner was requested, by the court or counsel, to address these two key questions arising under the capital sentencing statute.

The staff at Central State was initially ordered to evaluate only Smith's competency to stand trial; upon written request of the Commonwealth's Attorney and verbal request of defense counsel, Dr. Dimitris also expressed an opinion regarding his sanity at the time of the offense. Dr. Dimitris and Mr. Pugh both testified that the provisions of the capital sentencing statute were not brought to Dr. Dimitris' attention until the day of the sentencing trial, and even then the focus was on dangerousness, and not mitigation.

By court order dated September 28, 1977, Dr. Pile was requested to evaluate Smith's "mental condition...at the time of the alleged offense and his mental condition at the time of the examination." Dr. Pile and Mr. Pugh both testified that neither defense counsel discussed the purpose of the evaluation with him at any time, either before or after the October 1 examination. Dr. Pile also testified that the provisions of the capital sentencing statute were never brought to his attention.

Dr. Showalter testified that, in order to develop an expert opinion on these mitigating mental abnormalities, a clinician must conduct a more extensive evaluation than that required to determine sanity or competency. By their failure to request either psychiatric examiner to direct his clinical attention to the statutory mitigating abnormalities, counsel made it impossible to investigate and prepare a case in mitigation, compromising Appellant's right to explore and present a "defense" based on mental abnormality. A competent attorney "must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed..." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968).[22]

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22. In Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978), Judge Haynesworth stated that the defendant's Sixth Amendment right to effective assistance imposes a

> correlative duty on defense counsel to undertake reasonable steps to investigate all open avenues of defense. The circumstances [here] clearly suggested that an exploration of his mental condition was such an avenue.

See also Brennan v. Blankenship, 472 F. Supp. 149 (W.D.Va. 1979).

As both Dr. Showalter and Dr. Dimitris noted, the subtle distinctions of the statute require a more detailed and more sophisticated examination than that normally conducted to determine whether the defendant is legally insane. The symptomatology of one who is legally insane is rarely subtle, particularly as the standard is defined in Virginia. Most psychiatrists and attorneys believe that the defendant must be psychotic (grossly out of touch with reality) to be legally insane. Goldstein, The Insanity Defense 69 (1967). Thompson v. Commonwealth, 193 Va. 704 (1952); David v. Commonwealth, 214 Va. 681 (1974).

In this case, neither examiner was requested to focus his attention on the range of psychological factors that might be relevant to the existence of extreme emotional disturbance or to any non-psychotic impairment of Smith's ability to conform his conduct to the requirements of the law.

It is clear from the record that neither examiner did so. Counsel had not discussed the meaning of those mitigating factors, which were concepts that were unknown to the psychiatrists. In fact Dr. Pile testified at the evidentiary hearing that he believed that the mitigating circumstances under the capital sentencing statute were interchangeable with the M'Naghten inquiry. He had never been told otherwise.

While each examiner formed a diagnosis, neither conducted a sufficient examination concerning Smith's mental functioning at the time of the offense to address the statutory mitigating circumstances. The fault lies with counsel. It is not enough to obtain a psychiatric evaluation; counsel must tell the expert what issues to evaluate. Counsel failed to do so.

### E. Counsel's Mistakes Reflect A Systematic Failure To Understand The Practical And Legal Context Of Psychiatric Participation In A Capital Sentencing Proceeding.

Each of the three deficiencies of counsel's performance identified above is an independent and sufficient denial of effective assistance under Strickland v. Washington. Taken together, however, the prayer for relief becomes more compelling.

It was clear from the outset that the only real issue in the case was punishment, and that a successful defense would

have to be based on psychiatric testimony. However, psychiatric evaluations in capital cases present a series of complicated problems, which defense counsel completely failed to appreciate. Counsel failed to understand either the practical or legal aspects of a pre-trial psychiatric evaluation. Counsel failed to focus on the substantive significance of clinical evidence in the new capital sentencing scheme, and failed to take adequate steps to develop a clinical case in mitigation. Counsel did not understand the purposes, significance and limitations of psychiatric evidence, and therefore completely mishandled the expert testimony at trial. On all of these issues, counsel failed to do adequate research and preparation.

This court has recently recognized, in Estelle v. Smith, 451 U.S. 454 (1981), and Ake v. Oklahoma, ___ U.S. ___, 84 L.Ed.2d 53 (1985), the often critical role that psychiatry and psychiatric evidence may play in capital sentencing procedure. In Ake in particular, this court noted that defense counsel can only be effective in investigating, preparing, and presenting psychiatric evidence when counsel has access to the substantive knowledge of psychiatry sufficient to understand the complexities of that field. In Ake, this court recognized that, in some cases at least, the need for access to substantive psychiatric knowledge may be so great as to make it a constitutional requirement that a psychiatrist be appointed to assist defense counsel in the evaluation and preparation of the case, as well as merely in the presentation of evidence. Psychiatrists, in their role as defense experts,

> gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affect his behavior at the time in question. They know the probative questions to ask of the opposing parties psychiatrist and how to interpret their answers.

Ake, 84 L.Ed.2d at 64. (Emphasis added).

Of course, in this case Dr. Pile was appointed not as the "defense expert" envisioned under Ake, but rather as the court's expert. David Pugh did not have access to a psychiatrist in the way envisioned by Ake -- for consultation, advice, and deliberations on stratogy. He did not have access to a psychiatrist for the purpose of educating himself, a role which this court clearly envisioned in Ake. Unfortunately, Mr. Pugh also did not fill the void in his knowledge by any other means -- by contacting a psychiatrist on his own, by reading psychiatric texts, or by doing anything else to acquaint himself with the underlying substantive knowledge necessary to effectively investigate, prepare and present a case. Most importantly, he did not acquire the knowledge necessary to cross-examine Dr. Pile, or to do what the well-prepared defense lawyer would have done -- to sit down, with no cross-examination.

This Court has acknowledged the need for counsel to be well informed on psychiatric issues in capital cases. Even though this Court had not recognized a constitutional right to a defense consultant, the need was still there. Without a defense consultant, it was all the more important that defense counsel find other ways to acquire the substantive knowledge to conduct the defense. Counsel did not do so, a failure which fell outside the "range of competence demanded of attorneys" in similar cases, and a failure which clearly caused prejudice to Michael Smith.

In failing to adequately investigate a case-in-mitigation based on mitigating mental abnormality, as defined by § 19.2-264.4 (B), counsel failed to perform adequately one of the absolutely essential tasks in the representation of a defendant charged with a capital offense and, hence, fell outside the "range of comptence demanded of attorneys" in similar cases.

III

THE JURY INSTRUCTIONS AT THE SENTENCING PHASE OF PETITIGNER'S TRIAL WERE CONSTITUTIONALLY DEFECTIVE BECAUSE THEY COMPROMISED HIS RIGHT TO AN INDIVIDUALIZED DETERMINATION THAT DEATH WAS THE APPROPRIATE PUNISHMENT IN HIS CASE.

The trial court gave two instructions to the jury at the sentencing phase of Smith's trial. The first, Instruction 1,

was the general instruction; the second, Instruction A, concerned specific mitigating circumstances. Instruction 1 stated:

> The Court instructs the jury that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt that:
>
> 1. [The dangerousness circumstance]; or
>
> 2. [The vileness circumstance]:
>
> You may fix his punishment at death.
>
> If you find that the Commonwealth has failed to prove either (1) or (2) above beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment.

The first portion of Instruction 1 appears to direct the jury not to impose the death penalty unless it finds one of the aggravating circumstances specified by statute. The constitutional defect in the instruction lies in its final paragraph, which was presumably designed to tell the jury what to do *if* it finds an aggravating circumstance.

The instruction explicitly states that the jury is *permitted* to impose a life sentence if the Commonwealth fails to prove an aggravating circumstance or if the jury finds a superseding mitigating circumstance [i.e., a mitigating circumstance which does not "justify" a death sentence][23]. The instruction provides no express guidance to the jury as to what it should do if it finds an aggravating circumstance and no superseding mitigating circumstance. However, the instruction clearly implies that the jury is required to impose a death sentence in such a case. In essence, the overall effect of the instruction is as follows:

> You may fix the defendant's punishment at life imprisonment if the Commonwealth has failed to prove [either of the aggravating

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23. What obviously was meant was that the jury is *required* to impose a life sentence if it finds no aggravating circumstances or if it finds superseding mitigating circumstances. A literal reading of the instruction, as given, would permit the jury to impose a death sentence even if the prosecution failed to prove the aggravating circumstances.

> circumstances] or if you find that [the] mitigating circumstances overcome the aggravating circumstances. Otherwise, you shall impose a death sentence.

The effect of this instruction is to estblish a presumption in favor of a death sentence upon proof of an aggravating circumstance. The instruction implies that the evidence in mitigation must rise to some particular, but unspecified, level of significance to "justify" a life sentence. As a result, the jury would be required to impose a death sentence if it found no mitigating circumstances or if it determined that the statutory mitigating circumstances did not override the presumption. Specifically, the jury would be precluded from determining, based on all the circumstances, that death was not an appropriate sentence in Smith's case. Thus, the instruction places a thumb on the death side of the scales, requiring the defendant to bear the burden of overcoming this presumptive judgment.

Even if Instruction 1 does not establish the presumptive desirability of a death sentence, it is so confusing as to leave the jury uncertain of its obligations. It does not give the jury adequate and specific guidance regarding its prerogative to return a life sentence if it were to find an aggravating circumstance without any superseding mitigating circumstance. Smith had requested an instruction -- Instruction B -- that would have made this clear, but the requested instruction was refused.[24] Virginia law clearly permits the jury to impose a life sentence in such a case, Smith v. Commonwealth, 219 Va. at 480, yet the jury was not so advised at Smith's own trial.

On direct appeal of Smith's death sentence, the Virginia Supreme Court considered arguments raised on Smith's behalf that the sentencing phase instructions were constitutionally defective. Smith v. Commonwealth, 219 Va. at 479-80. While conceding that the instructions were not "artfully drawn", the Virginia Supreme Court held that when "read as a whole," the

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24. Instruction B would have specifically informed the jury that "even though you may find [either of the aggravating circumstances], after considering mitigating circumstances, you may fix his punishment at life imprisonment."

instructions "fairly expound the thrust of the statute" and were not inconsistent with the decisions of this Court. 219 Va. at 480.

Whether Instruction 1 in fact created a presumption in favor of death or simply left the jury wallowing about, unguided, the instructions compromised Smith's Eighth Amendment right to an individualized determination that death is the appropriate penalty in his case. Lockett v. Ohio, 438 U.S. 586, 601 (1978).

The Fourth Circuit's rulings to the contrary, in Petitioner's case and in its earlier decision in James Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), reflect a fundamental misunderstanding of this Court's decision in Zant v. Stephens and a failure to recognize the continuing significance of the principle of individualization in Eighth Amendment jurisprudence.

A. The Principle of Individualization is the Overriding Constitutional Imperative in Capital Sentencing Proceedings Under Statutes Which Have Genuinely Narrowed the Class of Offenses Punishable by Death.

Since this Court's watershed decision in Furman v. Georgia, 408 U.S. 238 (1972), it has struggled to reconcile two constitutional imperatives in capital sentencing. In Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983), this Court made clear that two constitutional principles -- and individualization -- govern capital sentencing procedures. The narrowing principle requires states to reduce the risk of arbitrariness by creating a statutory scheme which "genuinely narrows the class" of death-eligible offenders to those whose offenses "reasonably justify" the imposition of the death penalty. 77 L.Ed.2d at 249.

Once the defendant has been deemed to be in the class of people eligible for the death penalty, "what is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." 77 L.Ed.2d at 251.

The Fourth Circuit has interpreted Zant v. Stephens as a signal to the federal courts to refrain from engaging in "detailed scrutiny of state jury instructions on collateral review." James Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), cited

by the panel which decided Smith's case as "controlling authority," prohibiting federal court review of the jury instructions in this case. Petitioner respectfully contends that the Fourth Circuit has read too much into Zant v. Stephens. This Court did not mean to erase the basis for constitutional scrutiny of state sentencing decisions at the selection phase. To the contrary, the Court specifically reaffirmed the principle of individualization underlying Lockett and Eddings. Zant held only that a state may constitutionally leave the "ultimate" decision to the unfettered discretion of the jury: this Court's Eighth Amendment jurisprudence, from Woodson v. North Carolina, 428 U.S. 280 (1976), to Zant v. Stephens, holds that a state must provide a substantial measure of jury discretion.

B. Jury Instructions Which Fail to Inform the Jury of its Prerogative to Return a Life Sentence Even if it Finds One or More Aggravating Circumstances Which Establish a Presumption in Favor of the Death Penalty and Which Failed to Direct the Jury to Compare a Death Sentence Only if Such a Sentence Was Justified and Appropriate Under All of the Circumstances are Constitutionally Defective.

In James Briley v. Bass, supra, the Fourth Circuit implied that the constitutional requirement of individualization is satisfied so long as jury instructions do "not render the death sentence in any way mandatory or preclude consideration of any relevant mitigating evidence." 750 F.2d at 1245. This interpretation unduly circumscribes the principle underlying Lockett and Eddings.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), this Court announced that individualization is a constitutional imperative in capital sentencing proceedings:

> The fundamental respect for humanity underlying the Eighth Amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

The Court struck down mandatory statutes in Woodson, in Roberts v. Louisiana, 428 U.S. 325 (1976) (Roberts I), and Roberts v. Louisiana, 431 U.S. 633 (1977) (Roberts II). Elaborating further on the principle in Lockett v. Ohio, 438 U.S. 586 (1978), and

Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court has made clear that the jury's prerogative to impose a life sentence -- whether for a particular reason or for no reason at all -- must not be infringed.

Eddings is a natural extension of Woodson, Roberts I, Roberts II and Lockett. Woodson and Roberts I held that a state may not determine, ex ante, that death is the appropriate penalty for all offenders within a broadly defined death-eligible class. Roberts II held that the legislature may not determine, ex ante, even for a narrowly circumscribed class of offenses (the killing of a police officer), that no claim in mitigation could outweigh the aggravated character of the offense. Lockett held that a state may not determine, ex ante, that only some types of mitigating claims are compelling enough to warrant leniency. Eddings would seem to stand for the proposition that the state may not determine, ex ante, the weight which should be given to particular circumstances of a case, whether aggravating or mitigating. Such normative constraints, especially those which devalue claims raised by a defendant in support of leniency, must be avoided.

In an important line of cases concerning the Georgia statute, the Fifth and Eleventh Circuits have considered the implications of Lockett and Eddings for jury instructions on mitigation. The leading case is Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982), in which the Court invalidated instructions which failed to "clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Id. at 471 (footnote omitted). The Court relied on Lockett, reasoning that "this constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision." Id. at 470, quoting Chenault v. Stynchcombe, 581 F.2d. 444 (5th Cir. 1978).

Since this Court's decision in Zant v. Stephens, the Eleventh Circuit has reaffirmed the Spivey doctrine, concluding

that the cases decided thereunder require the trial court to: "(1) instruct the jury that it must consider mitigating evidence, (2) define mitigating factors and explain their function in sentencing deliberations,[25] and (3) inform the jurors that a finding of aggravating circumstances does not require them to return a death sentence." William Tucker v. Zant, 724 F.2d. 882, 891 (11th Cir. 1984), vacated and reversed en banc on other grounds, 762 F.2d 1480 (1985). The Spivey doctrine effectuates the Lockett principle by "communicat[ing] to the jury that the law recognizes the existence" of mitigating circumstances, Spivey at 472, and authorizes the jury to exercise its prerogative to determine if the death sentence is appropriate in the case at hand.

In James Briley v. Bass, supra, the Fourth Circuit implied that Zant v. Stephens had effectively overruled Spivey.[26] Petitioner respectfully disagrees. The Lockett principle cannot be reasonably limited, as the Fourth Circuit suggested, to a right to present mitigating evidence and a ban on mandatory death penalties. Eddings makes it clear that the principle also precludes the state from adopting any normative constraint on the sentencer's discretion which tips the scales toward a death

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25. The Court repeated the Spivey definition of mitigating circumstances as those that "do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment." Id., quoting Spivey v. Zant, 661 F.2d at 471 n.8.

26. This is also the view of the Georgia Supreme Court. Ross v. State 254 Ga. 22, 326 S.E.2d 194, 203-204 (1985) (quoting Briley v. Bass). Significantly, in several cases since Zant v. Stephens, the Eleventh Circuit has continued to apply the Spivey doctrine without so much as a footnote to indicate any possible inconsistency with that decision. In Tucker v. Zant, 724 F.2d 882, 890-92 (11th Cir. 1984), heard en banc and vacated on other grounds, 762 F.2d 1480 (1985); Drake v. Francis, 727 F.2d. 990, 1000 (11th Cir. 1984), vacated on rehearing en banc, 762 F.2d 1449 (1985) (approving the panel opinion on this issue, 762 F.2d at 1451); Collins v. Francis, 728 F.2d 1322, 1342-43 (11th Cir. 1984); Moore v. Zant, 722 F.2d 640, 646-47 (11th Cir. 1983), opinion en banc, 738 F.2d 1126 (11th Cir. 1984); Johnson v. Kemp, 585 F.Supp. 1496, 1508 (S.D.Ga. 1984); and Prejean v. Blackburn, 570 F.Supp. 985, 993-95 (W.D.La. 1983), the courts carefuly examined jury charges in light of the Spivey principles and found the charges adequate. In Finney v. Zant, 709 F.2d 643 (11th Cir. 1983); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Dix v. Newsome, 584 F.Supp. 1052 (N.D.Ga. 1984); and Ruffin v. Zant, 591 F.Supp. 1136 (S.D.Ga. 1984), the courts examined jury charges under Spivey and its progeny, found the charges constitutionally inadequate, and granted habeas relief.

sentence. For example, an instruction directing the jury to impose a death sentence on a defendant who killed a police officer unless the evidence in mitigation was "overwhelming" would be unconstitutional because it would, in effect, place a heavy weight on the side of death and devalue any claim which could be raised in mitigation.

In summary, a state is constitutionally precluded from imposing any normative constraint on the selection process which unduly compromises the defendant's right to an individualized determination of the suitability of death sentence in his case. Moreover, the state is constitutionally obligated to assure that the sentencer gives adequate weight to any claim offered by the defendant in support of a life sentence. These principles were violated by the instructions given in Petitioner's case.

Justice Stevens has recognized the Lockett problem presented in instructions, such as those given in Petitioner's case, that create a presumption in favor of the death penalty and thereby constrain the jury's discretion to recommend a life sentence. He recently commented on instructions, given pursuant to the North Carolina statute, which charged the jury that it had a duty to impose the death penalty if it found, inter alia, (1) that the aggravating circumstances were sufficient to impose the penalty of death, and (2) that the aggravating circumstances outweighed the mitigating circumstances:

> It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leave it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "'death is the appropriate punishment in a specific case.'" Lockett, 438 U.S. at 601 (plurality opinion), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

Smith v. North Carolina, 459 U.S. 1056, 1057 (1983) (opinion of Justice Stevens respecting the denial of certiorari.) To give the jury a broader measure of discretion, Justice Stevens recommended that North Carolina juries be instructed to determine

beyond a reasonable doubt whether "the imposition of the death penalty is justified and appropriate in the circumstances." Id. quoting State v. Wood, 648 P.2d 71, 83 (Utah, 1982). In State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, 327-28 (1983), the North Carolina Supreme Court adopted Justice Stevens' suggestions.[27]

In order to offer the fullest assurance that "death is the appropriate punishment in a specific case," Lockett, 438 U.S. at 601, a state may not establish a presumption in favor of death or otherwise constrain the jury's prerogative to decide, in light of all the circumstances, to return a life sentence.[28] This principle was violated in Petitioner's case.

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27. See also Justice Marshall's dissent from denial of certiorari in Jones v. Illinois, ___ U.S. ___, 78 L.Ed.2d 264 (1983), in which he expressed doubts about the constitutionality of a provision of the Illinois statute which requires that the death penalty be imposed if aggravating factors are found and "there are no mitigating factors sufficient to preclude the imposition of the death sentence." He observed that the instructions in Jones "may well have led the sentencing jury to conduct its deliberations under the assumption that petitioner had the burden of proving that the death penalty was inappropriate in his particular case." Justice Marshall concluded that he did "not understand this court's precedents to permit the placing of such a burden on a defendant."

28. It can be argued that the state should be required to establish a presumption in favor of life and that juries should be instructed in the following manner:

You should carefully consider the evidence presented by the defendant and should give the circumstances in mitigation whatever weight you believe appropriate. Even if you have found that one or both aggravating circumstances exist, you may fix the defendant's punishment at life imprisonment. You should not recommend the penalty of death unless you determine that it is the only appropriate penalty under all the circumstances of this case.

Even if the Eighth Amendment does not require a presumption in favor of a life sentence, the instruction given in Petitioner's case is constitutionally forbidden.

## CONCLUSION

The Fourth Circuit's major error in handling this case was to grossly distort this courts ruling in Zant v. Stephens. This distortion occurred in two different regards. The first distortion lead to the Fourth Circuit's deciding to ignore fundamental constitutional errors; the second distortion led to the Fourth Circuit's simply deciding the jury instruction issue incorrectly.

The easiest way for this Court to handle this case would be to simply remand the case to the Fourth Circuit with instructions to apply Zant v. Stephens as this court wrote it, not as subsequently interpreted by the Fourth Circuit. If the case were remanded to the Fourth Circuit with instructions to reach the merits of the issues, this case would be in a much better posture for full consideration by this Court.

If, on the other hand, this Court is not uncomfortable with the fact that the Fourth Circuit made no rulings on some of these underlying issues, and if this Court feels that the issues are ripe for determination, Petitioner prays this Court to grant certiorari as to all issues and to hear all of the issues on their merits.

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